PP

v.

ERWIN HARDY & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
HAMID SULTAN ABU BACKER JC
[CRIMINAL TRIAL NO: K 45-08-2003]
20 JUNE 2007

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Offence of trafficking - Allegation of - Whether prosecution has made out a prima facie case for trafficking against the accused persons - Ownership of vehicle where drugs were found - Whether proved - Failure to call witness - Evidence Act 1950, s. 114(g) - Whether could be invoked - Whether evidence adduced by prosecution could establish possession - Whether elements of trafficking satisfied - Whether charge should be reduced to offence of possession under s. 12(2)*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Offence of trafficking - Allegation of - Whether drug offence could be broken up into various offences - Second accused had earlier pleaded to lesser offence - Whether charge against second accused prima facie illegal - Federal Constitution, art. 7(2) - Criminal Procedure Code, ss. 302, 303*

The first accused and the second accused in this case were arrested at the same time as drugs were recovered from the car they were driving. Drugs were also recovered from the second accused from her body and she was charged and convicted in the magistrate's court. Notwithstanding that the second accused had been convicted for a lesser offence, the prosecution had preferred a charge against both the accused of trafficking in a dangerous drug, to wit 117.16 grammes of Methamphetamine thereby committing an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the same Act. The case of the prosecution was that on 11 June 2003, at about 4.45pm, a police party were patrolling around the area of Tanjung Aru on their routine duty. Upon receiving information by an informer, they followed a car bearing registration number ST 8680 D and observed two persons in the said car. A male (the first accused) was driving the car and a female (the second accused) was in the passenger seat. The driver parked the car at Casuarina Hotel. The police saw the accused proceeding from the said car to the hotel. Thereafter he was detained and a search was

conducted on him at the hotel lobby. The first accused later led the police to the car where the second accused was seated in the passenger seat. The police recovered drugs from the car and arrested and detained both the accused. The drugs were sent for analysis and the chemistry department confirmed it was methamphetamine. The prosecution, *inter alia*, submitted: (a) the prosecution wished to rely on the presumption of trafficking as afforded in law through s. 37(da) of the DDA 1952; (b) on the facts, the accused persons have knowledge of the drugs as when the accused was detained, he had been in a state of panic and later pointed out the car; (c) there were no breaks in the chain of evidence as the exhibit containing the drug was at all material times in proper custody and accounted for and (d) the evidence of the chemist was not challenged in this case. The defence however submitted that the prosecution had not made out a *prima facie* case for trafficking.

Held:

(1) In consequence of the arrest of both the accused, drugs were recovered. As a result, there should have been only one trial in respect of the drug offence. The drug offence here was a distinct offence and should not be broken up into various offences. This issue was further compounded by the fact that the second accused had pleaded to a lesser offence. Pursuant to art. 7(2) of the Federal Constitution, it would appear that the charge against the second accused was *prima facie* illegal. The law on this area was further captured in ss. 302 and 303 of the Criminal Procedure Code. (paras 6 & 7)

(2) There was overwhelming evidence that the drug 117.16 grammes of methamphetamine produced in court was indeed the one recovered by the police in consequence of the arrest in this case and the evidence was sufficient to rebut any adverse inference under s. 114(g) of the Evidence Act 1950 (EA 1950). (para 10)

(3) Both the accused were not owners of the car. No evidence was led to show how the first accused came into possession of the same. There was some evidence to show that the car was rented out to a person called 'Din' who was not produced as a witness. The defence took strong objection to this. It was crucial for the prosecution to lead further evidence on this issue. It was within the means and ability of

the prosecution to identify Din and produce him as a witness. On the facts of this instance, it did not prohibit the court from invoking adverse presumption under s. 114(g) Evidence Act 1950. (para 11)

(4) The evidence adduced by the prosecution was not sufficient in law to find the accused person guilty of trafficking. The evidence against the first accused was simply that he was driving a car and later he parked his car in front of a hotel and went into the hotel and thereafter he was detained and brought to the car and drugs were found in the car. This evidence standing alone independently would not satisfy the elements of trafficking. This court could not infer knowledge for the prosecution to establish possession. (para 12)

(5) In respect of the second accused, there was no evidence against her to call for the defence of trafficking or possession as she was only a passenger in the car. Applying the maximum evaluation test as set out in *Balachandran v. PP* it would be incumbent upon this court to acquit and discharge her forthwith. (para 13)

(6) Since the prosecution had failed to establish a *prima facie* case for trafficking, the first accused was entitled in law to seek for an acquittal. However, in this case, the court was exercising its discretion to amend the charge on the grounds of public interest to ensure proper measures were taken to curb drug offences. For this purpose, the charge was amended to one of possession under s. 12(2) of Dangerous Drugs Act 1952. (para 15)

[Order accordingly]

Case(s) referred to:

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] MLJ 23 ***(refd)***
Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC ***(refd)***
Munusamy v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
PP v. Samundee Devan Muthu Kerishnan [2006] 3 CLJ 161 HC ***(refd)***
PP v. Tan Chye Seng [1958] MLJ 94 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 165, 302, 303
Dangerous Drugs Act 1952, ss. 12(2), 37(da)
Evidence Act 1950, s. 114(g)
Federal Constitution, art. 7(2)

For the 1st & 2nd accused - Zahir Shah; M/s Zahir Shah & Co
For the prosecution - Syarifuddin Hj Abdul Rasa DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the submission of the defence that the prosecution has not made out a *prima facie* case for trafficking.

[2] Both the accused were arrested at about the same time. Drugs were recovered from the car. The investigating officer has given evidence that the accused persons have during investigation informed him that they do not know anything about the offending items found in the car. Drugs were also recovered from the 2nd accused from her body and she was charged and convicted in the Magistrate's Court. Notwithstanding that the 2nd accused has been convicted for a lesser offence, the prosecution has preferred a charge against both accused. The charge reads as follows:

> That you all, on the 11th day of June, 2003, at about 5.50 am at a carpark, Casuarina Hotel, Tanjung Aru in the District of Kota Kinabalu, in the State of Sabah, in furtherance of common intention of you all did on your own behalf traffick in a dangerous drug, to wit 117.16 grammes of Methamphetamine and that you all have thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under Section 39B(2) of the same Act read together with Section 34 of the Penal Code.

[3] The case of the prosecution can be summarised as follows:

(a) on 11 June 2003, at about 4.45pm, a police party led by Inspector Ederian bin Masaat were patrolling around the area of Tanjung Aru on their routine duty. Upon receiving information by an informer, they followed a car bearing the registration number

of ST 8680 D and observed that there were two persons in the said car. A male (the 1st accused) driving the car and a female (2nd accused) in the front passenger seat. The driver parked the car at Casuarina Hotel. The police saw the accused proceeding from the said car to the hotel. Thereafter he was detained and search was conducted on him at the hotel lobby. (b) the 1st accused later led the police to the car. Upon reaching the car, the police noticed the 2nd accused seated in the front passenger seat. The police recovered drugs from the car. Two brown envelopes were recovered. The first brown envelope was found to contain one plastic packet of crystalline substance suspected to be methamphetamine. The second envelope was found to have two packets containing crystalline substance which was also suspected to be methamphetamine. Further, one pouch bag by the name of "Mootsies" placed inside the front dashboard compartment of the car was recovered and was found to contain a packet of crystalline substance suspected to be methamphetamine together with a weighing machine. Body search was conducted on the 2nd accused which led to the finding of one small bag by the name of CYBERSHADES USA containing one plastic packet and another plastic packet containing crystalline substance suspected to be methamphetamine. Both the accused were arrested and detained. (c) the drugs were sent for analysis. The Chemistry Department confirmed it was methamphetamine, having a nett weight of 117.16 grammes, excluding the drug found on the 2nd accused.

[4] The prosecution, *inter alia*, submits as follows:

(a) the prosecution wishes to rely on the presumption of trafficking as afforded in law through s. 37(da) of the DDA 1952:

> any person who is found in possession of ... (xvi) 50 grammes or more in weight of Methamphetamine ... otherwise in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

There are two conditions that has to be satisfied in order to invoke the presumption ie, possession must be proven and the drugs must be listed under DDA 1952. Possession is not defined under the DDA 1952. However, it is now firmly established that to constitute possession, it is necessary to establish that: (a) the person has knowledge of the drugs; and

(b) that the person has some form or control or custody of the drugs. In *Wong Nam Loi v. PP* [1998] 1 CLJ 37, the court opined:

> In most cases, knowledge cannot be adduced by direct or tangible evidence but only by inference from the surrounding circumstances.

In *Chan Pean Leon v. PP* [1956] MLJ 23, the court stated:

> Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances" ... "knowledge cannot be proved by direct evidence; it can only be proved by inference from the surrounding circumstances" ... "there may be something in the accused's behaviour that shows knowledge, or the nature of things may so obvious that it is possible to say "he must know what it was' ...

(b) on the facts, the accused persons had knowledge of the drugs as when the accused was detained; he was in the state of panic and later pointed out the car. In *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43, the court stated that:

> Custody means having care of guardianship ... you cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them.

(c) there were no breaks in the chain of evidence as the exhibit containing the drug was at all material times in proper custody and accounted for. The chemist confirmed the exhibits were still the same exhibits as he had received and handed over to PW4 and further confirmed the form of crystalline substance that was transformed into powder for analysis. (d) the evidence of the chemist was not challenged in this case. Therefore it strengthens the prosecution's case and supports the charge. In *Munusamy v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221, it was stated that:

> The court is entitled to accept the opinion of the expert on face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the

> chemist to support his opinion, it is not necessary for him to go into details of what he did in the laboratory, step by step. The evidence adduced is sufficient for the prima facie case.

[5] In this case, the drugs which were recovered from the car and from the body of the 2nd accused were sent together to the chemist for analysis in a sealed envelope. After analysis, the drug was in the custody of the police with the envelope sealed by the chemist. The envelope was later taken to the Magistrate's Court to enable the prosecution to produce the relevant drug from the sealed envelope for the purpose of obtaining a conviction against the 2nd accused for a lesser offence under DDA 1952. The accused pleaded guilty in the absence of her counsel, notwithstanding the same counsel in this case was representing her in the Magistrate's Court. The counsels were not informed when the plea was taken. Encik Zahir Shah objected vehemently at the beginning of the trial, as well as during the trial. I have also cautioned the prosecution that it will be illegal to charge the 2nd accused as she had been convicted by the Magistrate's Court and it is not appropriate for the prosecution to introduce evidence of bad character as well as to show that she was involved with another offence relating to drug to bring home the charge of trafficking. I have dealt with such issues in my judgment in Kuching High Court case of CT-45-11-2005-II *PP v. Peter Kong* delivered on 18 June 2007 and I reproduce that part for the purpose of this case and it reads as follows:

> I immediately informed the prosecution it is not appropriate to introduce a document which will tend to implicate the bad character of the accused as well as to show that he was involved in another offence. Support for this proposition is found in many cases. In *Poon Soh Har & Anor v. PP* [1977] 2 MLJ 126, the Singapore Criminal Court of Appeal opined:
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> > In our judgment the evidence in respect of past criminal activities of the appellants was inadmissible. It offended against the principle laid down in *Makin v. Attorney-General of New South Wales* [1894] AC 57, in that first, it plainly tended to show that the appellants had been guilty of criminal acts other than that with which they were charged, for the purpose of leading to the conclusion that they were persons likely from their criminal conduct or character to have committed the offence for which they were being tried, and secondly, it could not be said to be relevant to any issue in the

A case. Because of the precise definition of "traffic" in section 2 of the Act which is restricted to the commission of a number of specific acts, evidence of such past acts was irrelevant as it could not prove the offence of trafficking on the day and time in question. The fact that the appellants had trafficked in heroin in the past did not mean that they were trafficking when arrested. Evidence of trafficking in heroin in the past merely raised the suspicion that they were having the heroin for purposes of trafficking and did not prove that they "did traffic" on the day in question. The admission of evidence of past criminal acts could not be justified on any ground and should have been rejected.

6. I must say here to some extent the law of evidence in relation to motive permits the court to allow evidence to show the alleged motive for a crime even though such evidence may suggest the commission of another crime by the accused. This aspect of the law is captured in section 8 of the Evidence Act 1950 (EA 1950). Evidence of motive is relevant. Under section 8, the following facts are relevant namely: (i) facts which show motive; (ii) facts that reveal preparation; (iii) facts which divulge previous or subsequent conduct of any person, provided if it is influenced by any fact in issue or relevant fact; (iv) statement accompanying and explaining acts; (vi) statements made in the presence and hearing of a person whose conduct is relevant provided the statement affects such conduct. Motive is that which induces a person to do a particular act. Every voluntary act has a motive. Motive and intention must be distinguished. A person's intention is his decision to do or not to do a particular act, but his motive is the reason for forming that decision. For example, when a poor woman with a child steals a loaf of bread, her intention is to steal but her motive may be to feed her child. Thus, motive is the emotion supposed to have led to the act. It is a psychological fact, which can be proved by the conduct of the accused. However, it is not always possible to discover motive behind an act but this does not mean that motive was absent.

Evidence of motive is relevant and material in criminal cases. However, where there is direct evidence and clear proof that the accused has committed the crime, the question of motive becomes irrelevant to sustain the conviction. When a case depends entirely upon circumstantial evidence, the issue as to motive becomes important.

In *Nath Singh v. R* [1949] Madras law journal 297, it was held that the evidence to show alleged motive for a crime is admissible even though such evidence suggests the commission of another crime by the accused. In this case, the accused was tried for the murder of Karnail Singh. Evidence was led to show that Karnail Singh was extorting money from the accused on the grounds that he knew the accused had killed one Bhan Singh. This fact was admitted to show motive for the murder. However, it needs to be emphasized here that motive is not admissible in such situations if it is for showing that the accused was likely to have committed the offence. Further, motive to infer bad character of the accused may not be relevant under section 54 of EA 1950.

In *Boota Singh v. PP* [1933] 2 MLJ 195, a previous police report was ruled admissible under section 8 to prove motive for a subsequent crime. Terrel Ag C J observed:

> In this case a report made by the deceased against the prisoner nine months before the murder was admitted in evidence by the trial Judge, as showing a motive for the crime. Counsel for the appellant argued.
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> (a) that the report was inadmissible under any section of the Evidence Ordinance; and
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> (b) that if it was wrongly admitted, it must have influenced the whole course of the trial, and that the accused was entitled to an acquittal.
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> The report was, however, put forward by the prosecution as showing or constituting motive under s. 8. It indicated that the deceased was on bad terms with the accused, and supported the oral evidence to the same effect. The conduct of the deceased in making a report against the accused is made relevant by the express terms of s. 8. Generally speaking, a statement is not 'conduct' within the meaning of the section, but in this case the statement accompanied and explained the deceased's act in making the report. It is accordingly expressly admissible in terms of Explanation (i) of s. 8.
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> It should be added that the report is not evidence of the truth of the deceased's allegation against the prisoner. It was admitted in evidence by the prisoner's counsel at the trial, and although this is by no means

> conclusive that the report should be admitted, it is I think clear that the reason why counsel admitted the report was because it was brought out in evidence that after the subject matter of the report had been investigated, no action was taken by the police, and this was pro tanto favourable to the prisoner, and it can be presumed in the prisoner's favour that the deceased's allegation were not true. The fact however that the report was made still remains and is admissible as showing the relations between the parties and in support of the motive alleged by the prosecution.

In *Lim Kong v. PP* [1962] 28 MLJ 195, the evidence of financial insecurity was made admissible under section 8 to show motive for kidnapping. Adams J observed:

> Kan Chow deposed that the accused had an outstanding debt for petrol supplied since 1959 of some $1,200. Tan Oon Cheng gave evidence that the accused had borrowed $4,000 to replace a diesel engine in SR 6959 and that he was in arrears of his installments in January and February, Mr. Marshall also referred to cross-examination of the accused along similar lines. It was not disputed and is in fact shown on the record that this evidence and cross-examination were introduced to show that the accused was in a state of financial embarrassment and the learned Deputy pointed out in his reply to Mr. Marshall that this evidence was admissible under s. 8 of the Evidence Ordinance 1950 to prove motive. Mr. Marshall argued, however, that it was purely evidence of bad character and was therefore inadmissible by virtue of s. 54 of the Evidence Ordinance. With respect to Mr. Marshall I do not think that evidence of financial embarrassment is necessarily evidence of a bad character within the meaning of s. 54. Furthermore, the evidence of financial instability supported equally the case for the defence as evidence of motive for the prosecution. Where a crime is financial, as this one is in part, evidence that the accused was being pressed to find money to satisfy his debts is relevant as tending a show a possible motive …

In *Wong Foh Hin v. PP* [1964] MLJ 149, the Federal Court allowed the previous incestuous relationship of the accused (father) with the deceased (daughter) to prove motive for the murder. The fact of the case was that the appellant was convicted of the murder of his daughter. Evidence was admitted at the trial of an incident three months before the daughter's death where the wife had complained to the village headman that the appellant had 'interfered' with his daughter and that the matter had been disposed of by the village headman stating that if this occurred again the matter would be reported to the police. On appeal, the sole question was whether the evidence of the above incident and also evidence of a similar incident just before the daughter's death were properly admitted. It was contended for the appellant that: (i) the evidence of the incidents which suggested an incestuous relationship between the appellant and his daughter amounted to evidence of bad character and was therefore inadmissible; (ii) and alternatively if it was admissible the trial judge should have exercised his discretion to exclude it on grounds that it's prejudicial effect far outweighed its probative value.

[6] In this case, I take the view that in consequence of the arrest of both the accused, drugs were recovered. As a result, there should have been only one trial in respect of the drug offence. The drug offence here is a distinct offence and should not be broken up into various offences. Support for the proposition is found in the case of *PP v. Samundee Devan Muthu Kerishnan* [2006] 3 CLJ 161, where Hishamudin Yunus J opined:

[3] From the evidence adduced by the prosecution, which I shall allude to in due course, the prosecution, strictly, should not have preferred two charges. There should have been only one charge: the prosecution should have combined the two charges into one. For the evidence will show that there was only a single incident leading to the arrest of the accused, and that the drugs were recovered from one place only, namely, from the boot of a car. Hence, as shown at a later part of this judgment, at the conclusion of the trial, when I made the finding of guilt, I have treated the two charges as one charge.

This issue is further compounded by the fact that the 2nd accused has pleaded to a lesser offence. This fact attracts art. 7 of the Federal Constitution which states:

A (1) No persons shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

B (2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

C **[7]** Pursuant to art. 7(2), it will appear that the charge against the 2nd accused is *prima facie* illegal. The law on this area is further captured in ss. 302 and 303 of CPC which states:

302. Person once convicted or acquitted not to be tried again for same offence.

D (1) A person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 166 or for which he might have been convicted under section 167.

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F (2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under subsection 165(1).

G (3) A person convicted of any offence constituted by any act causing consequences which, together with that act, constituted a different offence from that of which he was convicted, may be afterwards tried for that last-mentioned offence, if the consequences had not happened or were not known to the court to have happened at the time when he was convicted.

H (4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding the acquittal or conviction, be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed, if the court by which he was first tried was not competent to try the offence with which he is subsequently charged.

I (5) The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section.

ILLUSTRATIONS

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged upon the same facts with theft as a servant, or with theft simply, or with criminal breach of trust.

(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with and tried for robbery.

(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

(d) A is tried and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B.

(e) A is charged and convicted of voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts unless the case comes within subsection (3) of this section.

It is a fundamental right under art. 7(2) of the Federal Constitution that a person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted. Section 302 embodies the ancient maxim *nemo debet bis vexari Pro una et eadem causa* (a man shall not be twice vexed for one and the same cause). It incorporates the common law principles of the well-known pleas of *autrefois acquit* (formerly acquitted) and *autrefois convict* (formerly convicted). Section 302 as well as art. 7(2) of the Federal Constitution enacts the well known principle of criminal jurisprudence that no one should be put in jeopardy twice for the same offence. Thus, where an accused is tried for a certain offence and convicted or acquitted, he cannot again be tried for the same offence on the same facts. The law bars a second trial on the same facts. There may be occasions when it would not be appropriate to order a second trial even though the second trial may not be barred by the letter of s. 302.

[8] The following conditions are necessary before this principle can apply: (a) the same person should have been previously tried on the same facts; (b) the previous trial should have been by a court of competent jurisdiction; (c) the result of the previous trial should have been either a conviction or an acquittal; (d) the conviction or acquittal should remain in force, ie, only when such conviction or acquittal is set aside in appeal or revision, retrial may follow but not during the continuance of such previous acquittal or conviction. The CPC makes a clear distinction between 'discharge' and 'acquittal'. This section will only apply to acquittal and not discharge. The discharge of an accused will not shut out a second trial for two reasons; namely that an order of discharge is an order which is neither a conviction nor an acquittal and the case does not reach the stage of trial. In *PP v. Tan Chye Seng* [1958] MLJ 94, after the accused had been acquitted on a charge of giving false information to police officer, he was charged with giving the same information to the Registrar and Inspector of Motor Vehicles. The learned President of the Sessions Court accepted a plea of *autrefois acquit* and acquitted the accused. The public prosecutor appealed. The court held that this further charge could have been considered at the same time as the first at the first trial and it would therefore be wrong to continue the proceedings and put the accused in jeopardy again. The court stated that in the circumstances of the case the plea of *autrefois acquit* was valid. Further, the court stated that there may be occasions when it is proper to charge separately an offence which could be tried with another. It is however preferable that any such charge should be preferred at the same time as the principal charge so that it should not appear that the further proceedings are only brought because the first have failed. It is always open to the accused to request separate trials for a particular offence and for the court so to order if it is satisfied that the accused would be embarrassed in his defence by dealing with all the charges at the same time, even though such trial is permitted by s. 165 of the Code.

[9] Section 303 of CPC states:

> 303. Plea of previous acquittal or conviction.
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> (1) The plea of a previous acquittal or conviction may be pleaded either orally or in writing, and may be in the following form or to the following effect:

(2) Such plea may be pleaded together with any other plea, but the issue raised by the plea shall be tried and disposed of before the issues raised by the other pleas are tried.

(3) On the trial in the High Court of an issue on a plea of a previous acquittal or conviction the depositions transmitted to the Court on the former trial, together with the notes of the Judge if available, and the depositions transmitted to the Court on the subsequent charge, shall be admissible in evidence to prove or disprove the identity of the charges.

This section sets out the manner the plea of previous acquittal or conviction may be raised. It may be made orally or in writing and will allege that he is not liable to be prosecuted by virtue of s. 302 of the CPC. Such a plea must be tried and disposed of before the trial. For this purpose, the depositions transmitted to the court on the former trial with the notes of the judge if available, and the dispositions transmitted to the court on the subsequent charge are admissible as evidence to prove or disprove the identity of the charges.

[10] There was strong objection by the defence that there is a break in chain of exhibits. I have dealt with this part of the evidence in detail and I am satisfied that there was overwhelming evidence that the drug 117.16 grammes of methamphetamine produced in court was indeed the one recovered by the police in consequence of the arrest in this case and the evidence was sufficient to rebut any adverse inference under s. 114(g) of the Evidence Act 1950 (EA 1950). (See *Munusamy v. PP (supra)*).

[11] Both the accused are not owners of the car. No evidence was led to show how the 1st accused came into possession of the same. There was some evidence to show that the car was rented out to a person called 'Din'. Din was not produced as witness. The defence takes strong objection to this. I think on the facts of this case, it is crucial for the prosecution to lead further evidence on this issue. To my mind, it was within the means and ability of the prosecution to identify Din and produce him as a witness. On the facts of this instance, it does not prohibit me from invoking adverse presumption under s. 114(g) EA 1950. Support for the proposition is found in *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1, where Edgar Joseph Jr. FCJ opined:

> We recognize that the function of the prosecution is to prosecute, and that does not mean that it must discharge the function both of the prosecution and the defence.

A On the other hand, it is clear that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not. (See *The Lee Tong v. PP* [1956] MLJ 194.) The discretion, however, must be exercised having regard to the interests of justice, which includes being fair to the accused (per Lord [8] Parker CJ in *R v. Oliva* [1965] 3 Al ER 116 at p 122; [1965 2 WLR 1028 at p 1035), and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based, whether the effect of their testimony is for or against the prosecution (per Lord Roche in the Ceylon Privy Council case of *Seneviratne v. R* [1936] 3 All ER 36 at p 49, applied in *R v. Nugent* [1977] 3 All ER 662; [1977] 1 WLR 789).

Having said that, it is in our view clear law, that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see eg, *Adel Muhammed el Dabbah v. A-G (Palestine)* [1994] AC 156 at 167-9) the most basic limitation upon prosecutorial discretion in the presentation of a case, is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation which is nothing less that a statutory duty – the accused must be acquitted.

In the present case, the informer, having regard to his role, was not a mere informer, but had assumed the mantle of an agent provocateur, for it was he, who had put the appellant in touch with the undercover agent Lian. Indeed, he was the active instrument without whose intervention, the appellant might never have been even arrested. His identity was no longer a secret and thus he had lost the protection from disclosure of identity normally accorded to informers under s. 40 of the Act.

In these circumstances, he came within the category of witnesses, described by Lord Roche in Seneviratne, as "witnesses essential to the unfolding of the narratives on which the prosecution case is based." The same might be said of the informer's friend.

Yet, neither the so called informer nor his friend, whose testimony would have been essential to the unfolding of the narrative on which the prosecution case was based, was called by the prosecution or even made available to the defence to be called as defence witnesses nor any explanation vouchsafed to the trial Judge for these glaring omissions.

We hasten to add, that in a case such as the present, where it was never suggested by the prosecution that either of these individuals was not capable of belief, it would not have sufficed for the prosecution to have merely made them available to the defence to be called as defence witnesses as such a course would have put the defence to the disadvantage of not having been able to cross-examine them on any point on which they might support the prosecution case.

In our view, having regard to the circumstances of the present case, it was the obligation of the prosecution to call and examine these individuals as their witnesses or, at least, to have offered them for cross-examination by the defence or in default to have explained why they were unable or unwilling to call them as the case may be. We say so because without their testimony there was a gap in the narrative of the prosecution case. Moreover, there was no suggestion that their testimony would have been obviously hostile to the prosecution or otherwise unreliable, in which case, "the prosecutor will ensure that the accused is given the opportunity to call the witness". (Per the High Court of Australia in *Richardson, ibid*).

We also observed that although Counsel for the appellant did, in the course of his address in the Court below, criticize the prosecution for failing to call the informer, nowhere in his judgment did the Judge direct his attention to this point. This, in our view, was a serious misdirection by way of non-direction which had occasioned a grave miscarriage of justice.

[12] The counsel for the 2nd accused says that by virtue of s. 302 of CPC, she is not liable to be tried again. There is merit in this argument. Further, in this case, the evidence adduced by the prosecution is not sufficient in law to find the accused person guilty for trafficking. The evidence against the 1st accused is simply that he was driving a car and later he parked his car in front of a hotel and went into the hotel and thereafter he was detained and brought to the car and drugs were found in the car. This evidence standing alone independently will not satisfy the elements of trafficking. I cannot infer knowledge for the prosecution to establish possession.

[13] In respect of the 2nd accused, I do not see any evidence against her to call for the defence of trafficking or possession as she was only a passenger in the car. Applying the maximum evaluation test as set out in *Balachandran v. PP* [2005] 1 CLJ 85, it will be incumbent upon me to acquit and discharge her forthwith.

[14] In this case, the aid of presumption is necessary to establish a *prima facie* case against the 1st accused for possession under s. 12(2) of DDA 1952. My reasons for the decision are similar to that which I have stated in the case of *PP v. Peter Kong (supra)* and I reproduce the relevant parts:

> I take the view for this case that only with the aid of the statutory presumption under section 37(d), the prosecution can establish a *prima facie* case against the accused for an offence under section 12(2) of DDA which reads as follows:
>
> > No person shall have in his possession, custody or control any dangerous drug to which this Part applies unless he is authorized to be in possession, custody or control of such drug or is deemed to be so authorized under this Act or the regulations made thereunder.
>
> and can be punished under section 39A(2) with imprisonment for life or for a term which shall not be less than five years and also be punished with whipping of not less than 10 strokes. Further, I take the view that for any law relating to capital punishment, life cannot be taken purely as a result of inference of a judge, as article 5 of the Federal Constitution says according to law. Inference in capital punishment cases cannot be equated to law unless that inference made by the judge is one beyond reasonable doubt will lead to only one adverse conclusion against the accused. In drug cases, for the prosecution to drive home the offence of trafficking, it will be within constitutional guidelines to show direct evidence of trafficking and this can in my view to some extent can be achieved by leading evidence as to motive as set out in section 8 of EA 1950. Prosecution in drug trafficking cases often omits to introduce evidence of motive and shifts the burden on the shoulders of judges to infer knowledge of the drug to establish possession which will result in death sentence. I think that is wrong. I do not wish to elaborate on this issue further in this case as I find no evidence of trafficking and there was no argument put before me citing the views of judges and sages of law on this issue. In addition, I am not here armed with necessary materials on Constitutional doctrine to throw more light to substantiate my views at this stage. But from the few books I hold closely, I can safely say such inference is not good evidence and as such is not compatible with religious principles of major faiths which is articulated in Rukun Negara, the 1st principle being "Belief in God". In this context, I believe the prosecution has a constitutional duty and obligation within the intent and spirit of Rukun Negara to make sure in drug trafficking cases to show good evidence according to law to convict a person and not shift

the thrust on the judge to infer knowledge and then to rely on other provisions of the DDA 1952 to convict for trafficking. It will be more prudent for the prosecution to adduce direct evidence which they could if proper investigation and surveillance is done as being achieved in other jurisdiction. To invite inference from the judge to link a charge of trafficking in actual fact will have low probative value and will not pass the maximum evaluation test as propounded by the Federal Court in *Balachandran (supra)*. The learned judge Augustine Paul FCJ has as early as 1999 had anchored the argument in relation to *prima facie* case in *PP v. Dato' Seri Anwar Ibrahim (supra)*. I will say for any thing less than taking a life, prosecution may rely on presumptions but when it comes to life it cannot be purely based on inference when the law gives the prosecution every opportunity to prove the case by direct evidence, including motive which will have strong probative value contrast to inference. Much scholarship has been advanced in the area of law of drugs by Professor, Dr. Rani Kamarudin, who is now one of the Deputy Dean in International Islamic University Malaysia, particularly in his Ph.D thesis titled *"Legal Aspects of the Control and Prevention of Dangerous Drugs Misuse – Comparative Study of Malaysian and English Law."* Some support for my proposition can be found in the case of *Mohamed bin Hassan (supra)* where the Federal Court asserted that "In our view, to constitute 'possession' under s.37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of the possession as understood in criminal law, based on evidence.

[15] Since the prosecution has failed to establish a *prima facie* case for trafficking, the 1st accused is entitled in law to seek for an acquittal. However, in this case, I am exercising my discretion to amend the charge on the grounds of public interest to ensure proper measures are taken to curb drug offences. For this purpose, I am amending the charge to one of possession under s. 12(2) of DDA 1952. AND to effectively to do so, I am inviting the prosecution to propose the suitable amendments to the charge to enable me to direct that the amended charge be read to the 1st accused and a plea be taken. I shall thereafter proceed to make the necessary orders in relation to these proceedings.